No. 2742

United States Circuit Court of Appeals

For the Ninth Circuit

FRANK R. McCORMICK, AS RECEIVER OF THE FIRST NATIONAL BANK OF SALMON, A CORPORATION,
APPELLANT,

VS.

HARRY G. KING, NORMAN I. ANDREWS, GEORGE BUCK, GUY E. BOWERMAN, B. F. OLDEN, FRED G. HAVEMANN AND JOHN LOTTRIDGE,
APPELLEES.

APPELLANT'S BRIEF

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, EASTERN DIVISION

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STATEMENT OF THE CASE.

The First National Bank of Salmon, Idaho, was organized during the month of January, 1906. Continuously thereafter until the bank closed its doors on the 8th day of June, 1911, appellees were members of the board of directors and Apellee King was during said entire period except during the year 1908, President of the institution and in personal charge of its affairs.

On October 9, 1906, by-laws were adopted by the association which contained, among others, the following provisions:

> "Section 16: The Board of Directors of this bank shall hold regular meetings at the banking house for the transaction of business on the first Tuesday of each month, and should that day in any year fall upon a holiday, the regular meeting for that month shall be held on such other day as the directors at the preceding meeting may order."
>
> "The Board may also hold special meetings upon the call of the President, Cashier, or any three or more members, etc."
>
> "Section 17. There shall be a committee, to be known as the loans committee, consisting of the President, one Director, and Cashier, who shall have power to make loans, discount and purchase bills, notes, and other evidences of debt, and to buy and sell bills of exchange, and who shall at each regular meeting of the Board of Directors make a report of

all bills, notes, and other evidences of debt discounted and purchased by them for the bank since their last previous report."

"Section 19. No officer or clerk of this bank shall pay any check drawn upon it, or pay out money on any order, unless the drawer of such check or order shall, at the time of the presentation thereof, have on deposit in the bank funds sufficient to meet such check or order."

"Section 22. The Board of Directors shall have power to prescribe, and, when expedient, to change the form of books and accounts to be used in the transaction of the business of this bank, and to prescribe the general or particular manner in which its affairs shall be conducted."

"Section 29. There shall be appointed by the Board of Directors a committee of three members, whose duty it shall be to examine every month the affairs of this bank, to count its cash, and compare its assets and liabilities with the accounts of the general ledger, ascertain whether these accounts and all others are correctly kept, whether the condition of the bank is in sound and solvent condition, and to recommend to the board such changes in the manner of doing business, etc., as shall seem desirable, the result of which examination shall be reported to the board at the next regular meeting thereafter." (Pages 137-139).

Section 34 of said by-laws, at the request of the Comptroller, was amended on January 18, 1910, to read as follows:

"The board of directors of the bank shall at each monthly meeting or oftener, examine and approve all

loans and discounts and such approval shall be recorded in a book kept for that purpose." (Pages 164, 165).

Up to the close of the year 1909, the bank was prosperous. It had increased its capital stock from $25,000.00 to $50,000,00 to enable it to better handle its volume of business and besides the dividends declared, $15,000.00 had been carried to the surplus fund. It had, however, during that year, allowed a great many overdrafts and had made some excessive loans (p. 162). It had also purchased the assets of Langsdorf & Company, a rival institution, and had taken over numerous notes representing individual loans made by Langsdorf & Company, which though lawful for that bank, were far in excess of ten per cent of the capital and surplus of the said First National Bank. During the month of August, 1909, the Comptroller wrote a letter of remonstrance (p. 157), and the bank replied that some of the loans had been paid and the others would receive attention at maturity (p. 161), but as a matter of fact they were renewed (p. 353), and other excessive and improvident loans,—not renewals—were made.

During the year 1910 the practice of allowing overdrafts was continued and, as shown by the bank's minute record, plaintiff's Exhibit 23 (see also Tr. p. 357), the aggregate of overdrafts at times exceeded one-third the amount of the capital stock of the institution. As a result of this mismanagement and the inability of the bank to obtain payment of notes and accounts held by it, the Comptroller of the Currency directed plaintiff's predecessor to close the bank and take possession of its assets.

The improper loans above referred to included various amounts loaned from time to time to F. M. and S. A. Pollard, the Salmon Lumber Company, a corporation, in which a controlling interest was held by relatives of King, the President of the bank (pp. 175, 286), and to one Harry Brown, a sawmill owner, who, at the time, with other mill owners, was a party to a contract with said Salmon Lumber Company, the object of which was to control the lumber market in the Salmon country (p. 352).

When the bank closed on June 8, 1911, it held two notes of the Pollards, one for $1700.00 and one for $6250.00; two notes signed by Brown for $6250.00, and $6500.00 respectively, and four notes of the Salmon Lumber Company for $2500.00, $3500.00, $6000.00, and $3000.00, respectively, representing an indebtedness of $15,000.00. All these loans were unsecured. There was also due the bank on June 8, 1911, the sum of $9222.26 in overdrafts (p. 173).

Ascertaining that the amount collectible upon notes and overdrafts would be insufficient to discharge the liabilities, the Comptroller levied an assessment upon the stockholders (p. 181), and the receiver used every effort, including court proceedings (pp. 177-203-301), to make collection thereof and also collected all that it was possible to collect upon the overdrafts and the loans hereinbefore enumerated, but there remains unpaid of the bank's liabilities approximately $45,000.00 (pp. 300, 313).

The amount due upon the particular loans above referred to at the date of the trial was as follows:

Salmon Lumber Company	$13,629.20
Harry Brown	11,760.25
F. M. & S. A. Pollard	7,800.00

making a total of $33,189.45, not including interest and $47,459.30, with interest included (p. 217).

Judge Cowen, as assignee of the Salmon Lumber Company, testified that it is certain that not to exceed fifty per cent will be realized by creditors of that company (p. 276), so that the net loss on loans to that company will not be less than $6814.60.

Execution was returned *nulla bona* in an action by the receiver against Harry Brown to collect his notes (p. 214), so that the entire $11,760.25 is the loss sustained thereon.

Only $150.00 was realized upon the loans to the Pollards (p. 314), who were clearly shown to be insolvent (p. 318), so that the loss upon said loans will not be less than $7800.00.

The aggregate loss will, therefore, be not less than $26,374.85, not including any interest, and $40,644.70 with interest to the date of trial being included, and these totals are determined without taking into consideration attorney's fees and costs, included in the judgments which the receiver obtained against Brown and the Pollards.

The losses from the overdrafts are approximately $3900 (pp. 216, 217).

During the entire period while the bank was being mismanaged, Appellee King was present at every meet-

ing of the stockholders and Board of Directors and Appellee Andrews was present at all such meetings with possibly one or two exceptions, King being President of the bank, as before stated, and Andrews Vice President and Chairman of the Committee on Loans and Discounts (Plaintiff's Exhibit 23); but as shown by said exhibit, Appellee Bowerman was not present at any meeting of stockholders or directors during the entire period from the organization of the bank until the date of its failure.

This action is brought to recover from said directors upon their statutory liability for knowingly permitting and assenting to the making of excessive loans in violation of Sections 5147, 5200 and 5239 of the Revised Statutes of the United States, and also to recover upon their common law liability for negligently and carelessly failing to properly manage and conduct the affairs of said bank and in carelessly and negligently allowing the same to be grossly mismanaged, whereby the assets thereof were wasted and lost. The court found against the Defendants King and Andrews, measuring their liability pursuant to the provisions of the Statute rather than under the common law, but found in favor of the Appellee Bowerman. This appeal is from the judgment.

ASSIGNMENT OF ERRORS.

I.

That said decree is erroneous wherein it adjudges and decrees that the defendants, Harry G. King and Nor-

man I. Andrews, are each liable for, and that plaintiff have and recover of and from said Harry G. King and Norman I. Andrews, and each of them, the sum of $14,700.00 only, the said decree in this respect being necessarily based upon the finding and conclusion of the court that the extent of the liability of said defendants, having in view the nature of their wrongdoing, as shown by the evidence, is measured and limited by Sections 5147, 5200 and 5239, Revised Statutes of the United States, and that the said defendants are not liable at common law for the entire loss resulting from their said wrongful conduct.

II.

That said decree is erroneous wherein it adjudges and decrees that the plaintiff take nothing by reason of his complaint against the said defendant, Guy E. Bowerman, and that as to the said Defendant Bowerman, the plaintiff's bill of complaint be dismissed, the said decree being in this respect necessarily based upon the finding and conclusion that the said Bowerman was not guilty of such neglect of duty as a director of said First National Bank of Salmon as to render him liable either under Sections 5147, 5200 and 5239, Revised Statutes of the United States, or at common law, notwithstanding the fact that the uncontradicted evidence shows: That the said Bowerman was a duly elected and qualified director of said bank from the time of its organization in 1906 up to the time of the failure of said bank on the 8th day of June, 1911; that the by-laws of said bank in force during said period, among other things, provide:

"Section 16. The Board of Directors of this bank shall hold regular meetings at the banking house for the transaction of business on the first Tuesday of each month, and should that day in any year fall upon a holiday, the regular meeting for that month shall be held on such other day as the directors at the preceding meeting may order.

The Board may also hold special meetings upon the call of the President, Cashier or any three or more members, etc."

"Section 19. No officer or clerk of this bank shall pay any check drawn upon it or pay out money on any order unless the drawer of such check or order shall, at the time of the presentation thereof, have on deposit in the bank funds sufficient to meet such check or order."

"Section 29. There shall be appointed by the Board of Directors a committee of three members whose duty it shall be to examine each month the affairs of this bank, to count its cash and compare its assets and liabilities with the accounts of the general ledger, ascertain whether these accounts and all others are correctly kept, whether the condition of the bank corresponds therewith and whether the bank is in sound and solvent condition, and to recommend to the board such changes in the manner of doing business as shall seem desirable, the result of which examination shall be reported to the board at the next regular meeting thereafter."

"Section 34. The Board of Directors of the bank shall at each monthly meeting, or oftener, examine and approve all loans and discounts and such ap-

proval shall be recorded in a book kept for that purpose."

And notwithstanding the fact that the uncontradicted evidence further shows that without regard to said provisions of said by-laws and the provisions of the laws of the United States prescribing his obligations and duties as a director of said national banking association, the said defendant, Guy E. Bowerman, failed to attend any regular or special meeting of the board of directors during the entire period between the date of the organization of said bank and the date it closed its doors, to-wit: the 8th day of June, 1911, and failed, as such director, to exercise any supervisory or other control over the officers or clerks of said bank or to inspect or examine the loans, discounts and records of said bank monthly, or at all; that during said entire period the said officers and clerks of said bank were paying checks and orders drawn by numerous persons, who, at the time of the presentation of such checks and orders, had on deposit no funds with which to meet such checks and orders; that the examining committee of said bank was not reporting to the board of directors as required by the bylaws; that said bank was, during the years 1910 and 1911, being grossly mismanaged to such an extent that it was compelled to suspend business on the said 8th day of June, 1911, and notwithstanding the further fact, as shown by the evidence, that the said Bowerman, during practically the entire period of said mismanagement, had knowledge that said bank was being grossly mismanaged.

III.

That, by reason of the uncontradicted evidence as recited in the foregoing Assignment No. 2, the court erred in failing and refusing to adjudge and decree that the said Defendant Bowerman is liable at common law for all damages sustained in consequence of his negligent conduct, which damages, as shown by the evidence, amount to Thirty Thousand Three Hundred Seventy-nine and 85-100 Dollars ($30,379.85).

ARGUMENT.

The question for determination is whether or not each of the appellees is liable at common law for the entire loss sustained by the bank (Assignments 1, 2 and 3), and in this connection let us inquire as to their common law duties and whether or not appellees neglected to perform them. One of the leading cases upon the subject and upon which great stress will undoubtedly be laid by appellees is Briggs vs. Spaulding, reported in 141 U. S., 132; 35 L. Ed., 562. Four of the justices dissent from the decision of the court relieving the directors from liability, but the decision as to facts, is not controlling here, nor when analyzed does it announce principles which interfere with the right of the plaintiff in this case to maintain his action. The defendants in the Briggs-Spaulding case had been directors but for a very short period and under the circumstances the court felt that they had not been in office for such a length of time as to charge them with familiarity with the bank's affairs. To quote:

> "We are of the opinion that these defendants should not be subjected to liability upon the ground of want of ordinary care, because they did not compel the board of directors to make an investigation and did not themselves individually conduct an examination during their short period of service; or because they did not happen to go among the clerks to look through the books or call for and run over the bills receivable."

But the court, nevertheless declares, in the last paragraph of the opinion:

> "Without reviewing the various decisions on the subject, we hold that directors must exercise ordinary care and prudence in the administration of the affairs of the bank, and that this includes something more than officiating as figureheads. They are entitled, under the law, to commit the banking business, as defined, to their duly authorized officers, but this does not absolve them from the duty of reasonable supervision, nor ought they be permitted to be shielded from liability because of want of knowledge of wrongdoing if that ignorance is the result of gross inattention; but in this case, we do not think these defendants fairly liable for not preventing loss by putting the bank into liquidation within ninety days after they became directors, and it is really to that the case becomes reduced at last."

This decision has been cited by almost every court which has been called upon to consider the question of the liability of bank directors, but in none of the cases has it ever been regarded by the courts as a justification for relieving from liability directors whose conduct

has been so grossly negligent and so flagrantly in violation of the statute and the by-laws of the association as has the conduct of the defendants in this case. In Gibbons vs. Anderson, 80 Fed., 345, the Briggs-Spaulding case is given careful attention by Judge Severens, and it is held that "the management of the bank is cast upon the Board of Directors." And the court, after quoting the concluding declaration in the Briggs-Spaulding case, declares:

> "In my opinion it does not meet the requirements of this statement of the law that directors may consign the management of the operations of the bank to a trusted officer, and then repose upon their confidence in his right conduct, without making examinations themselves, or relying upon his answers to general questions put to him with regard to the status of the affairs of the bank. To begin with, it is to be assumed in every case that the directors have not selected any other than a man of good reputation for capacity and integrity. Any other idea assumes that they have been guilty at the outset of a glaring fault. Further, it is a well known fact that a large proportion of the disasters which befall banking institutions come from the malfeasance of just such men, and it would be manifest to everybody that only a satisfactory and quieting reply would be made by the official who has any reason for concealment. Again, what are the duties of management that are committed to the cashier, or the officer standing in his place? They are those which relate to the details of the business, to the conduct of particular transactions. Even in respect of these, his duties are conjoint with those of the board of directors. In large affairs it

is his duty to confer with the board. In questions of doubt and difficulty, and where there is time for consultation, it is his duty to seek their advice and direction. It is his duty to look after the details of the office business, and generally to conduct its ordinary operations. It is the right and duty of the board to maintain a supervision of the affairs of the bank; to have a general knowledge of the manner in which its business is conducted, and of the character of that business; to have at least such a degree of intimacy with its affairs as to know to whom, and upon what security, its large lines of credit are given; and generally to know of, and give direction with regard to, the important and general affairs of the bank, of which the cashier executes the details. They are not expected to watch the routine of every day's business, or observe the particular state of the accounts, unless there is special reason; nor are they to be held responsible for any sudden and unforeseen dereliction of executive officers, or other accidents which there was no reason to apprehend. The duties of the board and of the cashier are correlative. One side are those of an executive nature, which relate mainly to the details. On the other are those of an administrative character, which relate to direction and supervision; and supervision is as necessarily incumbent upon the board as direction, unless the affairs of banks are to be left entirely to the trustworthiness of cashiers. Doubtless there are many matters which stand on middle ground, and where it may be difficult to fix the responsibility, but I think there is no such difficulty here. The idea which seems to prevail in some quarters, that a director is chosen because he is a man of good standing and character, and on that account will give reputation to the bank, and

that his only office is to delegate to some other person the management of its affairs, and rest on that until his suspicion is aroused, which generally does not happen until the mischief is done, cannot be accepted as sound. It is sometimes suggested, in effect, that, if larger responsibilities are devolved upon directors, few men would be willing to risk their character and means by taking such an office; but congress had some substantial purpose when, in addition to the provision for executive officers, it provided further for a board of directors to manage the bank and administer its affairs. The stockholders might elect a cashier, and a president as well. The banks themselves are prone to state and to hold out to the public, who compose their boards of directors. The idea is not to be tolerated that they serve as merely gilded ornaments of the institution, to enhance its attractiveness, or that their reputations should be used as a lure to customers. What the public suppose, and have the right to suppose, is that these men have been selected by reason of their high character for integrity, their sound judgment, and their capacity for conducting the affairs of the bank safely and securely. The public act on this presumption, and trust their property with the bank in the confidence that the directors will discharge a substantial duty. How long would any national bank have the confidence of depositors or other creditors if it were given out that these directors whose names so often stand at the head of its business cards and advertisements, and who are always used as makeweights in its solicitations for business, would only select a cashier, and surrender the management to him? It is safe to say such an institution would be shunned and could not endure. It is inconsistent with the purpose and

policy of the banking act that its vital interests should be committed to one man, without oversight or control."

In Rankin versus Cooper, 149 Fed., 1010, it appeared from the evidence that the directors had left the management of the bank to a man by the name of Allis, and that Allis had so dissipated the bank's funds in various enterprises with which he was connected, that insolvency resulted. In that case also the Briggs-Spaulding case was interposed as a defense against any decree adverse to the defendants, but the court held against the construction placed upon that decision by the defendant's counsel. The case is really one passing squarely upon the common law liability of directors, and the court lays down certain principles by which it considers such liability is to be determined. The following is from the decision:

> "At the threshold of this case it must be said that the testimony does not show that any of the defendants in this proceeding gained or intended to obtain any pecuniary advantage or to make any improper personal gain out of the various transactions involved. As far as the evidence shows, the defendants were men in good standing in the community, and many of them active business men of high standing. Nor does it appear that they were guilty of knowingly assenting to or participating in the malversations of funds by the president of the bank which wrecked this one-time flourishing financial institution. The question rather is whether they were guilty of neglect in not knowing or ascertaining these things and in not taking steps to prevent or remedy them—such culpable neglect as would

make them liable under the general principles of the common law governing the duties of bank directors which apply to national banks as well as all other banks, and also under Section 5145, Rev. St. (U. S. Comp. St., 1901, p. 3463)—the national bank law—which provides that the affairs of such banks shall be managed by not less than five directors, and Section 5147, which makes it incumbent on every such director to diligently administer the affairs of such banks."

"Briefly summarized, I understand the law on this subject to be as follows: (1) Directors are charged with the duty of reasonable supervision over the affairs of the bank. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision over its affairs. (2) They are not insurers or guarantors of the fidelity and proper conduct of the executive officers of the bank, and they are not responsible for losses resulting from their wrongful acts or omissions, provided they have exercised ordinary care in the discharge of their own duties as directors. (3) Ordinary care, in this matter as in other departments of the law, means that degree of care which ordinary prudent and diligent men would exercise under similar circumstances. (4) The degree of care required further depends upon the subject to which it is to be applied, and each case must be determined in view of all the circumstances. (5) If nothing has come to the knowledge to awaken suspicion that something is going wrong, ordinary attention to the affairs of the institution is sufficient. If, upon the other hand, directors know, or by the exercise of ordinary care should have known, any facts which would awaken suspicion and put a prudent man on his guard, then

a degree of care commensurate with the evil to be avoided is required, and a want of that care makes them responsible. Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. (6) Directors are not expected to watch the routine of every day's business but they ought to have general knowledge of the manner in which the bank's business is conducted, and upon what securities its larger lines of credit are given, and generally to know of and give direction to the important and general affairs of the bank. (7) It is incumbent upon bank directors in the exercise of ordinary prudence, and as a part of their duty of general supervision, to cause an examination of the conditions and resources of the bank to be made with reasonable frequency. I have drawn the foregoing propositions largely from the leading cases of Briggs vs. Spaulding, 141 U. S., 132, 11 Sup Ct., 924, 35 L. Ed., 662, Gibbons vs. Anderson (C. C.), 80 Fed., 345, Martin vs. Webb, 110 U. S., 7, 3 Sup Ct., 428, 28 L. Ed. 49, Warner vs. Penoyer, 91 Fed., 588, 33 C. C. A., 329, and the recent decision of the Supreme Court of Ohio in the case of Mason vs. Moore, 76 N. E., 932."

We also call attention to the case of Allen vs. Luke, 169 Fed., 1018, for a statement of the law with respect to the liability of directors, both under the statute and at common law, wherein the court holds that the statutory liability is not exclusive and does not relieve the directors from their common law duty to be honest and diligent in accordance with their oath. Bearing in mind the principles announced in the cases cited, let us examine the facts in this case.

The first real cause for trouble was the purchase of

the Langsdorf bank. Not in the purchase itself, but because of the fact that numerous heavy loans were taken over, among which were the following:

J. W. Moore	$16,000.00
I. O. O. F. No. 5	16,000.00
W. J. Wettenberg	10,000.00
H. W. Soule et al	7,500.00
H. W. Soule et al	7,500.00

(Page 157).

The capital and surplus of the bank was $65,000.00 (p. 222), and therefore each of these loans was excessive and when shown by the report to the Comptroller called forth a prompt direction by that official that they be reduced to the statutory limit (157).

In due time the Moore, Odd Fellows and Wettenberg notes were paid, but the Soule notes, which were also signed by Appellee Andrews (p. 353) were renewed. If the purchase of these obligations as part of the assets of the Langsdorf bank was not in violation of law and did not constitute carelessness it was certainly mismanagement and carelessness to renew the Soule loans for an amount in excess of the statutory limit, and especially is this true when the Andrews Light & Power Company in which Andrews and Soule were stockholders was at the time also indebted to the bank (353).

From the date of the purchase of the Langsdorf bank, Appellee King and one Lottridge, the executive officers of the bank, had a free hand. During 1910 Andrews drew a salary of $100.00 per month as Vice President but apparently participated but little in the actual con-

duct of the bank's business. In direct violation of the by-laws overdrafts were allowed almost without restriction. In July, 1910, they amounted to $17,138.85 (p. 350), (in excess of one-fourth of the capital and surplus); in December they had increased to $23,805.00, and on January 10, 1911, they exceeded $28,000.00 (pp. 357, 358). Plaintiff's Exhibit 23 shows that the board of directors had knowledge of this habitual and persistent violation of the by-laws and yet there was no effort to check the president and cashier or to interfere in any way to safeguard the bank's interests against probable loss. While it is true that when the bank was closed the overdrafts had decreased to $9800.00, it was evidently on account of the fact that the necessities of the patrons of the bank immediately preceding that date had been less urgent rather than because of any action on the part of the directors to reduce the overdrafts. The loss in overdrafts was the result of long continued negligence and carelessness of, and utter disregard of duty by the directors. The trial court entertained the view that the by-law forbidding overdrafts was adopted inadvertently and that the general acquiescence in its violation should be enough to excuse the directors from liability. While Appellee King testified that the by-laws were a copy of the by-laws of some other national bank, there is no question about them having been properly adopted (pp. 135, 292), and that the directors by appointing a "loans and discount committee" (see Plaintiff's Exhibit 23), and by amending Section 34 at the request of the Comptroller (pp. 164, 165), recognized the by-laws as being in force. Furthermore, if the by-

law forbidding overdrafts was without effect or by lack of observance could become ineffective, the same is true as to all the by-laws. The result would be that while the first violation of a by-law might be reprehensible, repeated violations acquired virtue in proportion to the frequency of their commission and that creditors of the bank may not complain where they suffer loss because a violation of the by-law designed for their protection if such violation has been persistent enough to have become habitual.

In Campbell vs. Watson (N. J.), 50 Atl., 120, it is said:

> "Another point made was that the fact that the by-law in question had been disregarded and fallen into disuse for so long a time was evidence from which the court might presume a repeal of it. I think the advancement of this argument hurts rather than helps the defendants. If I am right in my conclusion that the by-law is a wholesome and proper one, well contrived to protect the assets of the bank, then its repeal must be considered as a deliberate attempt on the part of the directors to give themselves a license to be negligent in the performance of their duties; and, of course, any conduct which would indicate a repeal by implication is subject to the same criticism."

It is interesting to note that in that case, as in the case at bar, the defense was interposed that the bank had been occasionally examined by the state bank examiner. Of this defense the court declares:

> "I am of the opinion that the fact that such examinations were occasionally made furnishes no

excuse to the directors for not acting under the by-law."

It was further urged in favor of some of the defendants that they were not aware of the existence of the by-law in question, but in answer to this contention, the court declares:

> "It seems to me quite impossible, from the judicial standpoint, to hold that these defendants are excusable on the ground of their ignorance of the provisions of the charter of their corporation and the by-laws made according to law, and thereby forming a part of their charter."

Let us next consider the particular loans to the Pollards, the Salmon Lumber Company and Brown. Was there such carelessness and negligence with respect to these as to render the directors liable at common law? King explains that notes were taken from time to time to cover overdrafts (pp. 286, 287), and that the notes held by the bank when it closed its doors represented the aggregate of overdrafts allowed these persons. The record discloses that the Salmon Lumber Company was operated by the relatives of Appellee King (p. 286), that he extended credit to this concern to about $15,000.00 (pp. 165, 168); that Harry Brown, who obtained an aggregate of $12,750.00, was engaged in the lumber business under some agreement entered into with the Salmon Lumber Company, having for its object the control of the lumber industry in the Salmon country (pp. 352, 353), and that the Pollards were allowed to overdraw because from appearances King seems to have considered a loss improbable. It appears from the

evidence that Defendants' Exhibit 2 (Discount Register) is a book furnished by the Comptroller of the Currency in which was to be listed all loans made and which was to be inspected by the directors each month (p. 331), but it is significant that King did not enter in that record any of the loans above referred to (pp. 331, 333). He says they were not loans because they were overdrafts. It cannot be that in his efforts to promote the interests of the Lumber Company and Brown, he feared discovery by the board of directors, for the board never made investigation, but it is evident that he wished these matters to escape the eye of the bank examiner, who would have criticized any such loans if they had come under his observation. The losses because of these loans were the result of the same policy of mismanagement which resulted in the losses from overdrafts and yet in face of the showing made, the trial court held that only King and Andrews were liable and these persons only to the amount of the excess of each loan above $6500.00, and not at all for overdrafts.

In Williams vs. McKay (N. J.), 18 Atl., 824, it is held that "for losses occasioned by loans made by the president, habitually and continually in disregard of the charter and by-laws and not interfered with by the managers, all managers in office at the time of the making of the loans are liable."

The following is from the opinion of the court:

> "It is next important to determine what duty devolved upon the managers with reference to loans by the bank. That duty was defined by Chief Justice Beasley in this case, when it was before the

court of errors and appeals upon demurrer to the bill (40 N. J. Eq., 195), in these words: 'The duty belonging to such a situation is a plain one—to care for the moneys intrusted to them in the manner provided in the charter, and to exercise ordinary care and prudence in so doing.' * * * These defendants held themselves out to the public as the managers of the bank, and by so doing they severally engaged to carry it on in the same way that men of common prudence and skill conduct a similar business for themselves. In short, the duty was to lend the bank's money not only in the manner indicated and required by the charter, but also prudently; the prudence required being measured by the character and objects of the institution. It cannot be questioned that in pursuance of their duty it was proper for the managers to define the duties of the officers of the bank, and, to facilitate the transaction of business, to appoint small committees from their number to superintend those officers, and dispose of unimportant detail and routine work that could not readily be disposed of by the more numerous and unwieldy board of managers, for it would be almost impracticable for the managers, in a body, to attend to such matters. But it does not follow, because of the appointment of such officers and committees, that the managers, who were not charged with official duty, might relax vigilance, and rely entirely upon officers and committees. A man of common prudence and skill in managing a similar business for himself, would not be guilty of such unguarded confidence. He would from time to time acquaint himself with the manner in which such delegates were performing their duties, and with the practices which prevailed in the conduct of the business, so that he might determine whether the

business methods were safe and proper. He might not look so closely into the affairs of the business as to detect concealed and isolated instances of wrong-doing, but he would so familiarize himself with their workings that he would readily detect habitual looseness, carelessness, and wrong-doing. Upon this subject the chief justice remarked: 'The charter required the defendants to meet at least twice a year as a board of managers; and such regulation was almost entirely useless, unless on such occasions it was their duty to supervise the conduct of their committees, and to look generally into the affairs of the company. There is no ground for the belief that it was the intention of the legislature that none but such managers as acted on committees should have the charge of the affairs of this bank. The only guaranty given to depositors consisted in the reputation of its managers with respect to probity and fiscal ability, and such guaranty was a mere snare, if more than two-thirds of such officers were to have no substantial part in the management. Doubtless, such officers had the right to rely in many respects on the skill and diligence of their committeemen, and if exercising a reasonable circumspection, they were unaware of the misconduct or neglects of such agents, they would not be responsible for the consequences. But so plain was their duty to oversee the business done by such committeemen that, it seems to me, they are chargeable, prima facie, with a knowledge of what was doing, or had been done, in all important matters by such bodies.' * * * The finance committee appears to have exhibited a similar indifference to the duty imposed upon it. At each meeting of the board of managers the lists of the securities of the bank showed new investments, upon which the committee

> had never acted; yet it failed to assert its right to pass upon the investments, and to protect against the usurpation of its functions by the officers of the bank. The atmosphere was one of apathetic disregard of personal obligation, and abject submission to the will of the president of the bank. There does not seem to have been the least inquiry into the propriety, honesty, or legality of his methods until after it was discovered that the bank had been ruined."

How applicable is the foregoing to the facts in the case at bar. Habitually and continually King and Lottridge violated not only the statute relating to excess loans, but the by-laws of the institution and all rules of safe banking, and their wilful and negligent conduct was allowed to proceed without interruption by the Loans and Discount Committee and the Board of Directors. Although the by-laws required reports from such committee, so far as the evidence shows, the Board never had such a report submitted to it, and never called for one; and while this committee was, of course, clearly negligent, and while its negligence contributed to the condition of insolvency, so also did the negligence of the Board of Directors in not seeing to it that this committee furnished proper reports, and in not supervising and overseeing generally the affairs of the institution and keeping watch upon the acts and transactions of the President and Cashier. As stated in the case just cited, the appointment of the Loan and Discount Committee did not permit the Board of Directors to relax their vigilance, neither can they escape the consequence of their negligence in failing to perform the duties which

their oath enjoined upon them by claiming that the responsibility was shifted upon the Loans and Discount Committee or to the officers whom the Board of Directors had selected to actively manage the daily affairs of the bank.

It will be urged on behalf of Appellee Bowerman that he could not conveniently attend the meetings of stockholders and directors owing to the length of time it would require to go from St. Anthony to Salmon (pp. 53, 292); that he had no actual knowledge of the excessive loans and no information that the bank was being mismanaged. In his answer, Bowerman admits knowledge of mismanagement and contents himself with the plea that he remonstrated "with Harry G. King, president of said bank" (p. 54). He also pleads that when his protests were unheeded he resigned, but there is no evidence to that effect, in fact, Bowerman offered no evidence. It is also shown by Plaintiff's Exhibit 34 (page 293), written after the bank's failure, that Bowerman "commenced in July, 1910, writing the president of the institution and warning him as to what in my judgment would be the consequences if the policy of the management was not changed," etc.; that he felt it to be his duty to call attention "at various times, in no uncertain terms, to what seemed to me to be a very hazardous manner of conducting the bank" (p. 294). The entire letter is an effort of Bowerman to excuse himself and clearly shows his knowledge of conditions. However, let us concede that he was not fully advised, was it competent for the organizers of the bank to exempt him from responsibility and for Bowerman to thus secure

immunity, notwithstanding he continued to take oath as a director and hold himself out as such?

In Warren vs. Robinson (Utah), 57 Pac., 290, the court quotes with approval the following declaration of Lord Chancellor Hardwicke:

> "I take the employment of a director to be of a mixed nature; it partakes of the nature of a public office, as it arises from the charter of the crown. * * * * Therefore, committeemen are properly agents to those who employ them in the trust, and who empower them to direct and superintend the affairs of the corporation. In this respect they may be guilty of acts of commission or omission, of malfeasance or non-feasance."

Referring to malfeasance or nonfeasance, the chancellor said:

> "To instance, in non-attendance: If some persons are guilty of gross non-attendance, and leave the management entirely to others, they may be guilty by this means of the breaches of trust that are committed by others. By accepting a trust of this sort, a person is obliged to execute it with fidelity and reasonable diligence, and it is no excuse to say that they had no benefit from it, but that it was merely honorary; and therefore they are within the case of common trustees."

In Marshall vs. Farmers' etc., Savings Bank; 85 Va., 676; 17 Am. St. Reports, 84, it is held:

> "Bank directors are liable to the depositors for losses resulting from the fact that such directors did not attend to the business of the bank, absented themselves from regular meetings of the board of

directors, and through their inattention permitted officers of the bank to withdraw money or property without authority, and other persons to largely overdraw their accounts, and notes to be rendered uncollectible from want of proper security, or from not being properly protected, or enforced by appropriate proceedings. The fact that any particular director did not know of these wrongdoings will not exonerate him, because he could not be without such knowledge, except from his own negligence."

In the course of its opinion, the court declares:

"But the co-directors seek to escape responsibility for all this, including the large loss to the Washington and Ohio Railroad, by claiming to have no actual knowledge of it at all. Did they exercise ordinary diligence to inform themselves, as their duty certainly required that they should? They were required to meet weekly by their own by-laws. They did not always meet semi-annually,—meeting sometimes once a year, as we have stated. They were in duty bound to cause the books of the bank to be examined at regular intervals. This they never did at all throughout their whole career, nor did they ever call for a statement of their accounts with other banks. Their vaults and their cash-drawer were emptied by illegal abstractions and insolvent loans, and they admit that they never knew it, and pleaded this as their exculpation. The stock subscribed for was not paid up, as has been stated, and yet such part as was paid up was treated as a loan, and interest paid on it, and a large part had never been paid up at the time of the suspension, and some of it has not yet been paid up. Having a bank with so small a nominal capital, with empty vaults, and despoiled cash-drawer, they owed at

the suspension of the bank, to depositors who had intrusted to them their money, $53,063.63, on which they have been able to pay ten per cent. If these directors had any duty to perform whatever towards their depositors, the records of this case do not show its performance. They plead ignorance. One of their number was the president of the Washington and Ohio Railroad in its last hours, and knew its condition, and secured himself; but the notes due the bank were allowed to sleep unprotested, unsecured, unrenewed, uncollected, and unsued on. One of their number was the president of the Alexandria Passenger Railroad Company, and knew its condition. One of their number was the brother of their defaulting debtor, Jameison, who was insolvent at the time of the loan of thousands to him without security. It is difficult to concede that they could have been ignorant of all this. But suppose they were. Their duty required that they should have looked well into all these matters; and if they have negligently trusted them to others, and loss has occurred, should it fall on them, or upon the depositors, who had trusted them, and whose trust they had accepted, and to whom they had solemnly promised such care and attention as were to be expected of good business men?

"We think the record shows that these directors, and all of them, have been guilty of such negligence in the premises as makes them personally liable for the losses caused by their negligence, and we are of opinion that the circuit court of Alexandria City erred in holding them exonerated. While this is true, there is nothing in the record which shows any bad faith, or tends to show any dishonesty on the part of some of these gentlemen, who appear to have confided their duties to others, and to have

been betrayed by them; but this was such negligence as will fix liability upon them, and their act in assuming this attitude of trust and confidence was voluntary and led to the confidence which has resulted in loss."

In Rankin vs. Cooper, 149 Fed., 1010, it is said:

"It is also urged in defense of Col. Roots that he was necessarily absent from Little Rock a great deal, and hence unable to attend many board meetings. The same defense is made on behalf of Defendant Blass, who spent much of his time in trips to the East in connection with his mercantile business. But to permit this to operate as a defense in a case of this kind would be putting a premium on the failure to attend board meetings and a penalty on those who attend regularly."

Proximate Cause of Loss.

At the conclusion of the taking of the evidence the court made the following inquiry:

"On the assumption that the court may find the directors negligent, is there any evidence that the negligence contributed to the damage or loss? If it appears that the directors were negligent, how is the loss resulting from such negligence to be distributed, the question more specifically applies to Mr. Bowerman, whether or not, if it is assumed that it was negligence for him to remain away from the meetings, upon what basis could the court rest its conclusion that his negligence in that respect resulted in injury or loss to the bank or its stockholders, and whether his presence would have availed them anything?"

Assuming that the same question may arise in the minds of this court, we shall discuss it briefly.

There can be no question under the authorities which we have already cited, that Mr. Bowerman's conduct in failing to attend a single directors' meeting from the organization of the association in 1906 up to its failure on June 8, 1911 (p. 291), was the grossest kind of negligence. Can it be said that he, in any manner whatsoever, discharged the duties enjoined by his oath to diligently manage the association? If he had done anything toward the management of it, it might be necessary to determine whether his negligence was slight or gross, but when there is no conflict in the proof that he did nothing at all in performance of his duties especially when he had some knowledge that the bank was being mismanaged, then, of course, his negligence can be nothing else than gross. So, as to Mr. Bowerman, gross negligence is proven. Let us go one step further. The loss has been proved, and we are only required now to convince the court that Bowerman's negligence was the proximate cause of such loss. We shall endeavor to do this, but we desire first to say that it was not incumbent upon us to go to the extent indicated by the court and show that if Bowerman had been in attendance at the meetings, the result would have been otherwise. We contend that, having shown that a duty was enjoined upon Bowerman to exercise care and diligence to prevent mismanagement and thereby to prevent the loss which has resulted to the bank, and having further shown that he wholly disregarded that duty and that the other members of the board disregarded similar

duties enjoined upon them, that is to say, the duty of informing themselves of the bank's condition with respect to the loans in question and other similar loans, and of supervising the affairs of the bank, whereby said loans would have been prevented or adequate security obtained for their protection, that we have made a case against Mr. Bowerman, upon the theory that the negligence of all of the directors, either in failing to supervise the bank or in failing to prevent the continued misconduct and mismanagement of the President and Cashier, raises the conclusive presumption that the mismanagement occurred and continued because of such negligence, and the members of the board of directors, having each been negligent, though it be in different manner and in different degree, renders each liable for the loss which the mismanagement entailed. The selection of a Loan and Discount Committee did not relieve the directors from giving that attention to the bank's affairs which otherwise might be expected and required of them. We have shown by the authorities heretofore cited, that the appointment of such a committee could not, as a matter of law, exempt the directors from the performance of the duties and obligations with which they were charged as the managers of the association, and it cannot be said that although the proof shows that Mr. Bowerman neglected to attend the meetings of the board of directors and was therefore negligent, that what might be termed the intervening negligence of the Loan and Discount Committee could save him from responsibility. His act in absenting himself, or rather, his negligence for failing to supervise the institution and

to attend the meetings of the board of directors, was a proximate cause of the loss, no matter how gross the negligence of the Loan and Discount Committee. Upon this question of proximate cause, we direct the court's attention to the case of City National Bank vs. Crow; Okla., 111 Pac., 210, wherein the court declares:

> "In the case at bar it is admitted that the defendants made a loan that was in excess of the statutory limit, and that a loss was suffered by the bank by the non-collection of the full amount of said loan. But the defendants contend 'the loss was occasioned by the intervening negligence of our successors in office in not exercising due care and diligence in the sale of the property taken to secure the loan, and not by our original negligent act in making the same.' We do not believe the rule contended for by counsel applies to the instant case. It is true that, as a general rule, if one is guilty of a negligent act which would not have produced the loss or injury but for the subsequent intervening negligence of another, he will not be responsible for the resulting damages. 1 Thompson's Commentaries on Law of Negligence, 55. This doctrine, however, is subject to the provision, among others, that the circumstances were such that the injurious result which did happen might have been foreseen as likely to result from the first wrongful act or omission. 1 Thompson's Commentaries on the Law of Negligence, 57. The test of whether the act complained of was the remote or proximate cause of the injury is to be found in the probably injurious consequences which were to be anticipated; not in the number of subsequent events and agencies which might arise. 1 Thompson's Commentaries on the Law of Negligence, 58. The sections of the act of

> Congress under consideration 'treat the directors of a national bank as persons charged with a duty and a trust for the benefit of other parties; and, that when they violate such trust, the statute in effect declares that they shall compensate the parties who have been injured for that violation of the trust.' "

In point of upholding the principle that, though an intervening cause of negligence (the negligence of directors other than Bowerman, who attended the meetings and who failed to prevent the wrongful conduct by King and Lottridge, and also the negligence of the Loan and Discount Committee for also failing to restrain or prevent such unlawful and negligent conduct) may contribute to the injury suffered, nevertheless, another sort of negligence (that of Bowerman, in failing to discharge his duties as director by attending meetings, or otherwise), will also be held as a proximate cause, we refer to the case of Wilmington Star Mining Company vs. Fulton; 205 U. S., 58; 51 L. Ed., 708. In that case the question was whether or not the proximate cause of the injury suffered by the plaintiff was the improper direction given by the manager in ordering the plaintiff into the mine, or the fact that the mine was allowed to become filled with gases and thereby rendered unsafe as a place in which to work. The following is from the opinion of the court:

> "Now, conceding that the mine manager ordered Fulton into the west roadway, and conceding, further, that such order of the manager was one of the causes of the accident, for which no recovery could be had because not counted on in the declara-

tion, what follows? Simply this, that two concurring causes contributed to the death of Fulton,—one, the order of the mine manager, for which recovery could not be had under the declaration, and the other, the neglect by the mine owner to perform his statutory duty to prevent the accumulation of the dangerous gases which led to the accident. But, because one of the efficient causes, the order of the mine manager, under the pleadings, did not give rise to the right of recovery, it did not follow that therefore the owner was absolved from responsibility for the cause of the accident for which he was liable. Washington & G. R. Co. vs. Hicksy, 166 U. S., 521, 41 L. Ed., 1101, 17 Sup. Ct. Rep., 661."

In Chicago, etc., Railroad Company vs. Dinius; Ind., 84 N. E., 9, the court gives the following definition of proximate cause:

"Proximate cause is the efficient cause, or that which originates and sets in motion the dominating agencies that necessarily proceed, through other causes as mere instruments or vehicles in the natural lines of causation to the resulting controversy."

Applying this rule to the case at bar, we assert that Bowerman's negligence in absenting himself from the directors' meetings, and in failing to supervise the conduct of the bank's affairs, was an efficient cause of the bank's loss, for the reason that it was because of such negligence that King and Lottridge were permitted and allowed to continue in their wrongful conduct.

In Strauhal vs. Asiatic S. S. Company, Ore., 85 Pac., 230, the court quotes from Brown vs. Coxe Bros., 75 Fed., 689, as follows:

"The creation of a joint liability in tort does not depend upon proof that the same act of wrongdoing was participated in by both tort-feasors and that they were in concert and had a common intent or were engaged in a joint undertaking. But the rule under which parties become jointly liable as tort-feasors extends beyond acts or omissions which are designedly co-operative, and beyond any relation between the wrongdoers. If their acts of negligence, however separate and distinct in themselves, are concurrent in producing the injury, their liability is joint as well as several. Each becomes liable because of his neglect of duty, and they are jointly liable for the single injury inflicted, because the acts or omissions of both have contributed to it."

In Memphis, etc., Gas Company vs. Creighton, 183 Fed., 852, it is said:

"It is claimed that the proximate cause of the injury was the act of Mrs. Bramhall in bringing the lighted match into contact with the gas. This might be so if it had been a supervening cause which rendered the first cause inoperative. The truth of the matter is that the causes of the injury were concurrent. The accumulation of the gas was one; the lighted match was the other. The effect of the former had not ceased, but co-operated with that of the other in effecting the injury. In such case an inquiry about the proximate cause is not pertinent, for both are liable. Grand Trunk Ry. Co. vs. Cummings, 106 U. S., 700, 1 Sup. Ct., 493, 27 L. Ed., 266; Gila Valley, etc., Ry. Co. vs. Lyon, 203 U. S., 465, 27 Sup. Ct., 145, 51 L. Ed., 276; Deserant vs. Cirilles, etc., Ry. Co., 178 U. S., 409, 20 Sup. Ct., 967, 44 L. Ed., 1127; Kreigh vs. Westinghouse, etc., Co., 214 U. S., 249, 29 Sup. Ct. 618, 53 L. Ed., 984;

and our own decision in Great Lakes Towing Co. vs. Kelley Island, etc., Co., 176 Fed., 492, 497, 100 C. C. A., 108. If the act of one be not negligent when tested by rules of law, a priori, must that one be liable whose culpable negligence has led directly to the injury without the intervention of any unlawful act. Whether Mrs. Bramhall was guilty of an inexcusable negligence in her use of the lighted match would be a question of fact with which we do not propose to deal. For the present purpose it is immaterial. It would be a profitless task if we should undertake to expound the general doctrines of proximate cause, or to canvass the great number of cases which the industry of counsel has collected in their brief. One point, however, we think it proper to notice. It is contended that it would not have been foreseen as probable that a lighted match would be put near the gas, and that therefore the defendant would not be liable for an accident caused thereby. There are many cases in which such language has been employed, but incorrectly as we think. If the thing done produces immediate danger of injury, it is not necessary that the author of it should have in mind all the particular results which might happen from the presence of the danger. Doyle vs. Chicago, St. P. & K. Ry. Co., 77 Iowa, 607, 42 N. W., 555, 4 L. R. A., 420; Texas & Pac., Ry. Co. vs. Carlin, 111 Fed., 777, 49 C. C. A., 605, 60 L. R. A., 462, affirmed 189 U. S., 354, 23 Sup. Ct., 585, 47 L. Ed., 849.

"The third proposition is, in substance, that the result would have been the same if a lighted match had been applied, as was done by Mrs. Bramhall, before the time when the defendant became negligent. Perhaps, but only perhaps. The accumula-

> tion of gas was constantly increasing, and an explosion at an earlier time might not have been so serious as to have caused the injury complained of. The proposition itself is a matter of speculation, and without value in determining the result of the actual conditions in which the injury happened."

In line with these authorities, we contend that there were several concurrent causes of the loss suffered by the bank:

1. Wrongful conduct of King and Lottridge in making the improper loans.

2. Negligence of the loan and discount committee in failing to make proper inspection to ascertain the condition as to the bank's loans, and in failing to render reports as required by the by-laws.

3. Negligence of the members of the board of directors who did attend the meetings of the board and who either passively acquiesced in the misconduct of King and Lottridge or indifferently allowed them to proceed unrestrained, and who neglected to require the loan and discount committee to furnish the board with detailed information as to the bank's loans, and in failing to exercise supervisory control of the bank's affairs.

4. Negligence of Bowerman in failing to attend directors' meetings and in failing to inform himself as to the bank's condition, and in failing to exercise any supervision as a director.

It will not do to say that results might have been just the same even if Bowerman had attended the meetings and otherwise performed his duty. He has no right

to the application of any such a rule. He is liable if the loss was the probable result of, or likely to follow, his neglect of duty.

Suppose Bowerman had attended the meetings of the board, but had done nothing to keep himself informed of the conduct of King and Lottridge, would his negligence have rendered him liable? Certainly. Then, to say he is not liable when he is guilty of still greater negligence is to say in effect that the more he was at fault the less his responsibility. That cannot be and is not the law.

Before we close the discussion of the common law liability of directors, we wish to call attention to one more authority, which so clearly defines their duties and obligations as to leave nothing else to be said upon the subject. It is the case of Campbell vs. Watson (N. J.), 50 Atl., 120, and the opinion is by Vice Chancellor Pitney:

> "The question to be determined, then, is simply, how much money has the bank lost by the negligence of the defendants in the performance of their duty as directors? And here we must meet the question of what is actionable negligence in the concrete, as applied to the particular facts of the different specifications of negligence found in the bill and sustained by the proofs. At the outset, I make some preliminary observations: First: The language of this topic, of judges, as reported in the books, must, in all cases, be construed in the light of the facts of the particular case. Second: The various directions in which the care of directors of banking institutions should be exercised in order to protect against fraud and theft of employes has greatly in-

creased in number and variety within 50 years. Experience has developed modes of theft by such employes unknown and unthought of half a century ago, and these manifestations of ingenuity on the part of the thieves has been met by new safeguards on the part of the directors; so that what years ago would have been considered due diligence cannot be so considered today. Third, so numerous have been the defalcations and dishonest abstractions of money by employes of high grade, who had by years of right living and acting earned the confidence of their employers, that it has become well-nigh a maxim with such institutions to, so to speak, trust nobody beyond what is necessary to the practical business of the bank, and to subject the work of each one, from the highest to the lowest, to periodical investigation. Fourth: That at one time and in some instances bank directors were unpaid servants, who were not expected to spend much time or to give much attention to the affairs of the institution, and on that account were dealt with leniently by the courts; but at this day such officers are not expected to work gratuitously, and are usually paid a fair compensation; and, whether paid or not, they are entitled to no indulgence on that account. Their names give credit and standing to the institution, and are guaranty to dealers that its affairs will be conducted with reasonable prudence and care, and according to law. They are, in my opinion, bound to acquaint themselves with the extent and mode of supervision exercised by officers of a well-conducted banking institution in the neighborhood. I cannot yield to the suggestion of some of the defendants' counsel that the fact that the institution in question was a small country bank relieved its directors from adopting the same practical

measures for protection against frauds and thefts as were in use by its greater neighbors in the larger towns. Fifth: Another observation is that the directors cannot be held liable for a mistake in an honest judgment upon matters properly mere matters of judgment, as distinguished from matters of administration. In matters of administration, where a duty to perform certain functions devolves upon them, they are justly held liable either for their non-performance, non-feasance, or their lack of ordinary diligence in their attempted performance, whereby loss is incurred. By 'ordinary diligence' I mean such as is exercised by other prudent and diligent officers under like circumstances."

Upon the question as to how the loss resulting from the negligence of the directors is to be distributed, we reply that each is liable for the entire loss which occurred during the period while he was a director. Such clearly is the conclusion reached in Rankin vs. Cooper, see 149 Fed., 1017.

The same question was considered in Warren vs. Robison, wherein the court states, quoting from Chancellor Hardwicke:

> "Another objection has been made that the court can make no decree upon these persons which will be just, for it is said a man's non-attendance or omission of his duty is his own default, and that each particular person must bear such proportion as is suitable to the loss arising from his particular neglect, which makes a case out of the power of this court. Now, if this doctrine should prevail, it is indeed laying the ax to the root of the tree, but if on inquiry before the master there should appear

to be a supine negligence in all of them, by which a gross complicated loss happens, I will never determine that they are not all guilty. Nor will I ever determine that a court in equity cannot lay hold of every breach of trust, let the person be guilty of it either in a private or public capacity."

And Chancellor Pitney, in Campbell vs. Watson, concluded his opinion with the remark:

"For the reasons already stated at too much length, I am unable to find any of the defendants blameless, and will find a decree against all for the several sums above mentioned."

In Williams vs. McKay (N. J.), 18 Atl., 824, it is said:

"Where a loss has resulted from dishonesty, disregard of the charter's requirements, or culpable negligence, all the defendants who are chargeable with such faults must be held alike responsible, so far as the receiver is concerned, without reference to the degree of dereliction; but, as between them ~~our-~~selves, there may be grades of liability, according to the degrees of culpability. In 2 Lewin, Trusts, 909, it is said: 'Though, as respects the remedy of the *cestui que* trust, each trustee is individually responsible for the whole amount of the loss, whether he was the principal in the breach of trust or was merely a consenting party, yet, as between the trustees themselves, the loss may be thrown upon the party on whom, as recipient of the money or otherwise, the responsibility ought in equity to fall, or, if he be dead, upon his estate.' In considering the various items of loss for which the defendants are liable, I have taken into consideration the equities

which appear to exist between them, with a view to establish the order of their liability."

See also:

Marshall vs. Farmers' etc., Bank; 85 Va., 676; 17 A. St. Rep., 84.

We respectfully submit that the decree of the trial court should be reversed and that judgment should be entered against each of the appellees based upon their common law liability, for the entire amount of the loss to the bank by reason of their negligence, that is, to say, for $26,374.85 loss sustained by reason of improvident loans and $3900.00 on account of overdrafts, making a total of $30,274.85.

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